A recent case, however, lays down that one who entered a foreign partnership "must be taken to have consented" that the foreign court should settle partnership disputes, and upon that ground holds valid a deficiency judgment recovered abroad in winding up the partnership by the foreign partners against the non-resident partner. *Emanuel* v. *Symon*, 23 T. L. R. 94 (Eng., K. B. D., Nov. 26, 1906). This seems to go too far. A partnership agreement is only a contract; and in general one who contracts in a foreign country does not consent either actually or constructively that disputes in regard to the contract shall be settled in the courts of that country.[11] Nor has partnership been held to be peculiar in this respect. A foreign partner does not, by entering the partnership, consent to be adjudged a bankrupt,[12] or to be sued as partner by third parties,[13] without personal service. It seems doubtful, therefore, to find such consent conferred, as between the partners themselves, by the mere formation of the partnership.

RECENT CASES.

ANIMALS — TRESPASS ON REALTY — JOINT LIABILITY. — The defendants were in common occupation of a cattle range, and each of them owned several cattle in a herd. This herd entered the plaintiff's close and injured her crops. *Held*, that the defendants are jointly responsible for the damage done. *Wilson* v. *White*, 109 N. W. Rep. 367 (Neb.).

Ordinarily, when a trespass is committed by several animals belonging to different owners, the owners can be held severally but not jointly for the damage done. *Westgate* v. *Carr*, 43 Ill. 450. When the harm done by the animals of each owner cannot be ascertained, the damages are apportioned equally if the animals presumably have equal powers for doing harm. *Partenheimer* v. *Van Order*, 20 Barb. (N. Y.) 479. If not, they are divided according to the number of animals owned by each defendant or according to their size. *Powers* v. *Kindt*, 13 Kan. 74; *Wilbur* v. *Hubbard*, 35 Barb. (N. Y.) 303. However, when several persons have animals in their joint control and keeping they are jointly responsible. *Smith* v. *Jacques*, 6 Conn. 530. And it is immaterial that the animals are also owned by them severally. *Jack* v. *Hudnall*, 25 Oh. St. 255. When the only connection between the owners is that they occupy in common a tract of land or herd their animals together, it would seem that there ought to be no joint liability. *Cogswell* v. *Murphy*, 46 Ia. 44. The impracticability of putting a plaintiff to a number of actions to gain redress may, however, justify an opposite ruling. This latter view finds support in that in many states statutes exist making owners of dogs jointly injuring sheep jointly responsible. See *Nelson* v. *Nugent*, 106 Wis. 477.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — TRUSTEE EQUIVALENT TO JUDGMENT CREDITOR OR PURCHASER WITHOUT NOTICE. — A New Jersey statute provided that an unrecorded conditional sale, where the chattels were delivered to the vendee, should be void as against judgment creditors or subsequent purchasers without notice. A vendee of chattels thus sold and delivered became bankrupt. *Held*, that the trustee in bankruptcy is vested with a title unimpeachable by the vendor. *In re Franklin Lumber Co.*, 147 Fed. Rep. 852 (Dist. Ct., Dist. N. J.).

For comment on a similar case, see 20 HARV. L. REV. 65.

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[11] Sirdar Gurdyal Singh *v.* Rajah of Faridkote, *supra*. But see Meeus *v.* Thelusson, 8 Exch. 638.

[12] *Ex parte* Blain, 12 Ch. D. 522; *In re* A. B. & Co., [1900] 1 Q. B. 541.

[13] Hall *v.* Lanning, 91 U. S. 160.

BILLS OF PEACE — BILL TO ENJOIN NUMEROUS SUITS IN JUSTICES' COURTS AND TRY AS ONE IN EQUITY. — For violation of a city ordinance requiring street railroads under penalty to furnish sufficient cars to prevent overcrowding, etc., the appellant had begun in the justice's court sixty suits against one appellee and a hundred against the other, and was threatening more. The two appellees for themselves and others similarly situated filed a bill of peace to have the suits enjoined on the ground that the ordinance was unconstitutional. There was no allegation that irreparable damage would ensue to the appellees from the enforcement of the ordinance, and the two were practically the only ones affected thereby. *Held*, that, under these circumstances, a bill of peace will not lie. *City of Chicago* v. *Chicago City Ry. Co. et al.*, 78 N. E. Rep. 890 (Ill.).

As there was no allegation of irreparable damage resulting from the enforcement of the ordinance, the appellees singly, under the rule prevailing in Illinois, would not have been entitled to a bill of peace on the ground of avoiding a multiplicity of suits, at least in the absence of a determination of one in their favor. *C. B. & Q. Rd.* v. *City of Ottawa*, 148 Ill. 397. The rule that enjoins all but one suit which is allowed to proceed at law seems preferable. *Third Avenue R. R. Co.* v. *Mayor of New York*, 54 N. Y. 159. The Illinois doctrine, however, gives to many parties subject to suits a bill of peace, although it denies such relief to one party subject to many suits. As there were but two parties in the principal case, it may be defended on the ground that they were not numerous enough to support the bill. This, however, is but a question of degree and, assuming they were sufficiently numerous, the question yet remains whether a community of interest in the law and fact involved is enough on which to found a bill of peace. Though the authorities are in conflict, the better rule says that it is. *Crawford* v. *Mobile, etc., R. R.*, 83 Miss. 708; *contra*, *Ducktown, etc., Co.* v. *Fain*, 109 Tenn. 56. See 14 HARV. L. REV. 611.

CARRIERS — LIMITATION OF LIABILITY — DEVIATION DEPRIVING CARRIER OF EXEMPTION. — A bill of lading exempted the shipowners from liability for damage arising from the act or neglect of the master, stevedores, etc. The ship deviated from the specified course. On its arrival at its destination the goods of the plaintiff were damaged by stevedores in unloading. *Held*, that the deviation deprives the shipowners of the exemption from liability. *Thorley, Ltd.* v. *Orchis Steamship Co., Ltd.*, 23 T. L. R. 89 (Eng., K. B. D., Nov. 21, 1906).

It is well settled that when a carrier deviates from the route specified by his agreement with the shipper, he becomes an insurer against all damage in any way traceable to the deviation, even when exemptions in the contract cover the predominating cause of the loss. *Maghee* v. *The Camden & Amboy R. R. Co*, 45 N. Y. 514; *Davis* v. *Garrett*, 6 Bing. 716. But it seems that the carrier would not be liable if the same damage must have occurred without deviation. See *Davis* v. *Garrett*, *supra*, 724; STORY, BAILMENTS, § 509. A reasonable basis for these cases is that the carrier should be liable for the direct and indirect consequences of the wrongful act of deviation. This view does not account for the present case, because the deviation was apparently not even a remote cause of the damage. The case requires the more extreme view that the breach in deviating cancelled the bill of lading and restored the carrier to his liability as insurer unrestricted by any exemptions specified therein. See *Balian* v. *Joly, Victoria & Co.*, 6 T. L. R. 345. The case under discussion seems to be the first direct application of this view.

CONFLICT OF LAWS — PERSONAL JURISDICTION — CONSENT AS BASIS. — The plaintiffs and defendant were members of an Australian partnership, the defendant being resident in England. The plaintiffs, without obtaining personal service on the defendant, brought action in the Australian court for dissolution of the partnership and for an accounting. They recovered a judgment, on which they sued in England. The defendant set up that the Australian court had no jurisdiction. *Held*, that the defendant by entering the partnership must be taken to have consented that the Australian court should settle part

nership disputes, and hence the judgment is valid. *Emanuel* v. *Symon*, 23 T. L. R. 94 (Eng., K. B. D., Nov. 26, 1906). See NOTES, p. 323.

CONFLICT OF LAWS — REMEDIES — RIGHT OF ACTION FOR DEFICIENCY ON MORTGAGE BOND GOVERNED BY FOREIGN STATUTE. — Under a New Jersey statute providing for the collection of a debt secured by bond and mortgage, a creditor was compelled first to foreclose and sell the mortgaged premises, and then, if there were any deficiency, he might sue for it upon the bond within a limited time. If he recovered judgment in such a suit, the judgment creditor might redeem the property provided his suit for redemption were brought within six months after the entry of the aforesaid judgment. *Held*, that the statute confines proceedings to collect a deficiency after foreclosure to the New Jersey courts, and hence that no action therefor is maintainable in New York. *Hutchinson* v. *Ward*, 114 N. Y. App. Div. 156.

The effect of the foreclosure proceedings under the statute was to extinguish the old obligation and, in case of a deficiency, to give a limited right of action therefor. See *Sea Grove, etc., Ass'n* v. *Stockton*, 148 Pa. St. 146. Rights are created only by law, and of course their nature and extent are governed by the law creating them. See *Lowry* v. *Inman*, 46 N. Y. 119, 126. Thus, it is settled that if a statute creates a liability and also limits the time in which actions may be brought upon it, the limitation as to time, being a part of the right, will be given effect by foreign courts. *Northern Pac. Lumber Co.* v. *Lang*, 28 Ore. 246. And where the statute creates a right and, by specifying a particular method of enforcement, indicates that the right is only to be enforced within the state, suit upon such right cannot be brought in a foreign jurisdiction. *Marshall* v. *Sherman*, 148 N. Y. 9; *Fowler* v. *Lamson*, 146 Ill. 472. Hence, if the right to sue for a deficiency in the principal case was confined by the statute creating it to a proceeding in New Jersey, as the court said, the court was clearly correct in refusing to entertain the present suit. The statute, however, does not seem to warrant that construction.

CONFLICT OF LAWS — SITUS OF CHOSES IN ACTION — SITUS OF JUDGMENT DEBTS FOR PURPOSE OF ADMINISTRATION. — A recovered a judgment in Virginia against B, who later removed to Missouri. A died in Virginia, and the plaintiff took out ancillary papers of administration in Missouri for the sole purpose of realizing on the aforesaid judgment against B, there being no other property of the deceased in Missouri. *Held*, that the judgment debt is an asset in Missouri, and being such, will support the issuance of ancillary letters of administration for the purpose of its collection. *Miller* v. *Hoover*, 97 S. W. Rep. 210 (Mo., K. C. Ct. App.).

It is undoubted law that a simple contract debt is an asset where the debtor is. *Saunders* v. *Weston*, 74 Me. 85. As regards judgment debts, however, the English rule, followed by some authority and many dicta in this country, locates them as assets where the record is. *Anonymous*, 8 Mod. 244; *Moore* v. *Tanner's Adm'r*, 5 T. B. Mon. (Ky.) 42. The minority view which holds them, like simple contract debts, assets where the debtor is, seems preferable. *Swancy* v. *Scott*, 9 Humph. (Tenn.) 327. A judgment debt, being a chose in action, has no situs. If it can be said to be located anywhere for the purpose of administration, it must be where the court has power to reduce it to possession. See *Speed* v. *Kelley*, 59 Miss. 47, 51. And that is obviously where the debtor is. Moreover, unless the judgment debt is considered an asset at that place, in cases where the debtor is in a jurisdiction different from that of the record, there will be no one who can collect the debt, for it is fundamental that an administrator or executor can bring no suit outside the jurisdiction which appoints him, nor can he take out ancillary letters where there are no assets. Therefore the principal case seems sound.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — RELATION BETWEEN EXECUTOR AND FOREIGN ADMINISTRATOR OF DECEASED. — A suit in equity was begun in Massachusetts, where the defendant, a citizen of Michigan, was personally served. Later the defendant died, and his will was

probated in Michigan. The suit in Massachusetts was continued against the administrator with the will annexed, and the decree went against him. *Held*, that the decree does not bind the executor in Michigan. *Brown* v. *Fletcher's Estate*, 109 N. W. Rep 686 (Mich.).

For a discussion of the principles involved, see 19 HARV. L. REV. 628.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — REVIEW OF TAX ASSESSMENT BY COURT. — The statutes of Kentucky provided a method for the assessment of back taxes, but did not expressly provide for any notice thereof or for a hearing. The plaintiff was assessed for back taxes, but obtained an injunction from the county court restraining collection of them. At the trial the court gave a hearing upon the validity and amount of the tax, reduced the assessment materially, and declared the rest a lien on the plaintiff's property. *Held*, that such a hearing, granted as of right, is sufficient as due process of law, though not provided for by the statute. *Security Trust & Safety Vault Co.* v. *City of Lexington*, U. S. Sup. Ct., Dec. 3, 1906. See NOTES, p. 320.

COPYRIGHTS — INFRINGEMENT — MUSICAL COMPOSITION. — For use in a piano-player the defendant had manufactured perforated rolls of the plaintiff's copyrighted music. The plaintiff sought to enjoin this as an infringement of his copyright. *Held*, that there is no infringement. *White-Smith Pub. Co.* v. *Apollo Co.*, 147 Fed. Rep. 226 (C. C. A., Second Circ.).

For a discussion of the case in the lower court, see 19 HARV. L. REV. 134. *Cf. Stern* v. *Rosey*, 17 App. D. C. 562.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — WHAT ACCOUNT CHARGEABLE WITH INTEREST ON BORROWED FUNDS. — A tramway company, for the purpose of converting its system from horse to electric traction, issued debentures bearing interest. *Held*, that a resolution charging the interest on the debentures to the capital account is proper. *Hinds* v. *Buenos Ayres, etc., Tramways Co.*, [1906] 2 Ch. 654.

If the end be within the scope of the corporate charter, any means, not inconsistent with the letter or spirit thereof, which is appropriate and adapted to that end, will normally be proper. *Union Bank* v. *Jacobs*, 6 Humph. (Tenn.) 515. In the case at hand no question is raised as to the propriety of electrifying the road, and the power to issue debentures to meet the cost is conceded. The court finds as a fact that the work is in the nature of construction, the cost of which may properly be charged to capital rather than income. Obviously the hire of the necessary funds, or interest, is as much a part of the cost of construction as the hire of the necessary men, or wages. Hence, though there is very little authority on the point, if the cost of construction is properly charged to capital, such interest may be included. See *Bloxam* v. *Metropolitan Ry. Co.*, L. R. 3 Ch. 337, 351; *Bardwell* v. *Sheffield Waterworks Co.*, L. R. 14 Eq. 517.

CORPORATIONS — CORPORATIONS DE FACTO — SUIT ON STOCK SUBSCRIPTION. — The plaintiff had been incorporated under color of law and had been doing business for several years when the defendant subscribed for stock. *Held*, that in a suit upon such stock subscription the defendant may not set up as a defense that the plaintiff was not legally incorporated. *Farmers' Mutual Telephone Co.* v. *Howell*, 109 N. W. Rep. 294 (Ia.).

When the rights of third parties have been predicated in any way upon the faith of the defendant's subscription to stock, or when the defendant has received any benefits from the corporation because of such subscription, he cannot set up as a defense to a suit upon that subscription that the corporation has only a *de facto* existence. *Dows* v. *Naper*, 91 Ill. 44; *Weinman* v. *Wilkinsburg, etc., Ry. Co.*, 118 Pa. St. 192. If, however, these objections do not intervene, there seems no reason in principle why there should not be a defense. *Kansas City Hotel Co.* v. *Hunt*, 57 Mo. 126. Unlike the ordinary contracts of a *de facto* corporation, the defendant in the case of a stock subscription does

not get what he contracted for. Stock in a *de facto* corporation is not so good as stock in a *de jure* corporation, and the defendant may be thrown under a personal liability which he did not contemplate. The above decision seems, nevertheless, to be in accord with the weight of authority in permitting a recovery without any consideration of the question of the interposition of the rights of third parties. *Swartwout* v. *Michigan Air Line Rd. Co.*, 24 Mich. 389.

CORPORATIONS — DIRECTORS — COST OF SENDING CIRCULARS AND PROXY FORMS CHARGED TO CORPORATION. — The directors of a railway company, whose policy was being attacked by a body of the shareholders, but who honestly believed in it, just before a general meeting sent out at the corporate expense circulars explaining and defending their policy, together with proxy forms with the names of certain directors thereon as proxies, with stamped envelopes for return postage. Certain shareholders applied for an injunction restraining further action of the kind by the directors. *Held*, that the application be denied. *Peel* v. *London & N. W. Ry. Co.*, 23 T. L. R. 85 (Eng., C. A., Nov. 19, 1906).

This case raises a question of considerable practical importance because of the prevalence of the practice of sending out, at the expense of the corporation, blank proxies and circulars. The decision seems founded on correct principles. Equity is somewhat reluctant to interfere in the internal affairs of a corporation. The shareholders must clearly show that the directors are acting either in excess of their powers or for their own interests in a manner harmful to the interest of the shareholders. See *Hawes* v. *Oakland*, 104 U. S. 450, 460. Directors in sending out circulars explaining and advocating this policy may well believe they are acting for the best interests of the corporation, which it is their duty to do. The sending of blank proxies with return postage would also seem within their powers, as it tends to the procurement of a full vote and the effectuation of the will of the whole body of stockholders. An earlier English case is overruled by this decision. *Studdert* v. *Grosvenor*, 33 Ch. D. 528. The point seems never to have been decided in America.

CORPORATIONS — STOCKHOLDERS — CONTRACT LIMITING NUMBER OF SHARES TO BE HELD BY EACH. — H was a large subscriber for shares in an organized corporation, but stock had not been issued to him. The corporate enterprise was abandoned, and H and others formed a contract for the revival of the corporation upon terms requiring that each person take no more than ten shares of stock and that H release his right to stock under his old subscription. The executors of H brought *mandamus* to compel the new corporation to issue the amount of stock for which H had originally subscribed. *Held*, that an injunction will be granted the other stockholders against the prosecution of this suit. *Hladovec* v. *Paul*, 78 N. E. Rep. 619 (Ill.).

There clearly was no adequate remedy at law here, since the officers of the corporation, when sued, would be unable to take advantage of the contract made between the stockholders. Equity, therefore, should grant relief, unless there is some objection on grounds of public policy. In all but a few exceptional cases it is well settled that a by-law restraining the alienation of shares of stock is void as being in restraint of trade. *Bloede Co.* v. *Bloede*, 84 Md. 129. A contract, however, to the same effect between stockholders rests upon an altogether different basis. *New England Trust Co.* v. *Abbott*, 162 Mass. 148; see *Adley* v. *The Whitstable Co.*, 17 Ves. Jr. 315, 323. It is often for the best interests of all concerned that there should be some such agreement. The contract, moreover, can be considered with reference to the particular transaction at hand; and, being expressly consented to by the stockholders against whom it is sought to be enforced, is not a general restraint imposed by the corporation on all persons holding stock. The decision of the above case is therefore sound, and any other result would be plainly inequitable.

CORPORATIONS — TORTS AND CRIMES — LIABILITY FOR CRIMINAL CONSPIRACY. — To an indictment for conspiracy in restraint of trade under the Sherman Anti-Trust Act, the defendant, a corporation, demurred. *Held*, that a

corporation can commit the crime of conspiracy. *United States* v. *Mac-Andrews and Forbes Co.*, 36 N. Y. L. J. 815 (Circ. Ct., S. D. N. Y., Dec., 1906). See NOTES, p. 321.

DIVORCE — ALIMONY — ASSIGNMENT OF ALIMONY. — A divorced wife who was entitled by the decree of divorce to a sum of money in full satisfaction of all claims for permanent alimony, assigned her right to a third person. *Held*, that such assignment is of no effect. *Fournier* v. *Clutton*, 109 N. W. Rep. 425 (Mich.).

The view in the United States seems to be that the very nature of alimony forbids alienation of it. It is given to the wife to insure her support, and for no other purpose will payment of it be enforced. *Jordan* v. *Westerman*, 62 Mich. 170. In England, although the cases are few, the same rule seems to apply. *In re Robinson*, L. R. 27 Ch. 160; but see *Ex parte Bremner*, L. R. 1 P. & D. 254. Similarly an allowance made by the court to a widow pending the settlement of the husband's estate is held to be inalienable, because given exclusively for her maintenance. *Hackley* v. *Muskegon Circuit Judge*, 58 Mich. 454. Even where the decree recites that a certain sum to be paid quarterly "shall stand as a final division of property" between the husband and wife, no assignable interest passes to the wife. *Kempster* v. *Evans*, 81 Wis. 247. Analogous to the above cases are those which hold that a pension granted to a public officer upon his retirement is not assignable. *Wells* v. *Foster*, 8 M. & W. 149. A distinction is made, however, between pensions given so that the recipient may keep himself in readiness for some future call and those given as a reward of merit. *Wells* v. *Foster*, *supra*; *Willcock* v. *Terrell*, 3 Ex. D. 323.

EASEMENTS — PRESCRIPTION — TENANT'S INTERRUPTION OF ADVERSE ENJOYMENT. — The defendant infringed easements appurtenant to land in the possession of a tenant for years. Before twenty years, the period requisite for title by prescription, had elapsed, the tenant brought suit for the infringement. After the twenty years the plaintiff as owner of the fee brought a similar suit *Held*, that the suit brought by the tenant does not interrupt the running of the prescriptive period against the owner of the fee. *Goldstrom* v. *Interborough, etc., Co.*, 36 N. Y. L. J. 489 (N. Y., App. Div., Nov., 1906). See NOTES, p. 317.

ELECTIONS — CONSTITUTIONALITY OF VOTING MACHINES. — A state statute authorized the adoption of a voting machine that should secure secrecy and be generally efficient. The state constitution provided that elections should be by ballot. *Held*, that voting by the machine is voting by ballot within the meaning of the constitution. *Elwell* v. *Comstock*, 109 N. W. Rep. 698 (Minn.).

Voting machines not only do away with separate paper ballots, but in some cases substitute mechanical accuracy both for the sensible knowledge of the voter that he has voted as he wished and for the responsibility of officials for the count. Therefore, under the Massachusetts Constitution which provides for a written vote to be counted by officials, some judges thought that the machine's action ought to be visible to the voters and officials. On the other hand, a written vote was defined by others as a change in a material object connected with the written name of a candidate, if such change in common understanding expressed a vote. See *Opinion of the Justices*, 178 Mass. 605. This latter construction, in not limiting the meaning of the word "ballot" too strictly, follows the general purpose of the ballot to secure a free, secret, and accurately recorded vote. See *Detroit* v. *Board of Inspectors*, 139 Mich. 548; *Lynch* v. *Malley*, 215 Ill. 574. There is authority along with the present case for disregarding the more specific meaning so long as an absolutely certain meaning is not opposed. *Temple* v. *Mead*, 4 Vt. 535; see *State ex rel. Robertson* v. *McGough*, 118 Ala. 159. The result in these cases, allowing new methods of fulfilling old purposes, is surely to be desired.

EQUITY — JURISDICTION — ENJOINING TRESPASS IN FOREIGN JURISDICTION. — The plaintiff sought an injunction against continued trespasses by the

defendants on his land in a foreign jurisdiction. The defendants, who appeared, denied the plaintiff's title in the *locus in quo*. *Held*, that equity is without power to grant relief. *Columbia Nat'l, etc., Co.* v. *Morton*, 34 Wash. L. Rep. 766 (D. C., Ct. App., Nov. 7, 1906).

The position here taken, though supported by some authority, is unsound. For a criticism of a case presenting similar facts, see 15 HARV. L. REV. 579.

ILLEGAL CONTRACTS — EFFECT OF ILLEGALITY — WHETHER ILLEGALITY BARS RECOVERY FOR FRAUD. — Confederates of the defendants induced the plaintiff to bet upon a foot-race by telling him that it was prearranged that a certain contestant should win. The other won, as the defendants had in fact arranged. The defendants lent to this scheme the use of their bank and credit, and thus lulled the plaintiff into a sense of security. *Held*, that the plaintiff is not barred by his own illegal conduct. Sanborn, J., dissented. *Stewart* v. *Wright*, 147 Fed. Rep. 321 (C. C. A., Eighth Circ.).

For a discussion unfavorable to the result reached in this case, see 20 HARV. L. REV. 60.

INSANE PERSONS — LIABILITY IN TORT — RESPONSIBILITY FOR DEFECTIVE CONDITION OF REAL PROPERTY. — From a building which belonged to a lunatic a portion of the floor had been removed and the opening left unguarded. The plaintiff, apparently an invited person, fell through the hole, and was injured. She sued the lunatic and his committee. The defendants demurred to the complaint. *Held*, that the demurrer be sustained. *Ward* v. *Rogers*, 51 N. Y. Misc. 299.

Where the law fixes an absolute liability on the owner of property for damage suffered by others through that property, it is proper that an insane owner should bear the same burden as a sane one. On the other hand, if responsibility for a certain tort can be fixed on a particular person only because of some fault, it would seem that the responsibility of an insane actor should depend on whether or not he was, as to those acts, a blamable person. CLERK AND LIND., TORTS, 4 ed., 48. The cases recognize that an occupier of land is not an insurer of its safety as to invited persons, but only owes a duty of reasonable care to prevent damage from unusual danger. *Larkin* v. *O'Neill*, 119 N. Y. 221. In the principal case it is a fair inference that the defendant's insanity precluded any possibility of his having been personally blameworthy. Further, he was not liable on principles of agency, for his committee was not in control of the property as his agent, but as an officer of the court. *Kent* v. *West*, 33 N. Y. App. Div. 112. The decision of the court is therefore sound, but in principle seems inconsistent with the doctrine previously enunciated by the New York Appellate Division. *McCabe* v. *OConnor*, 4 N. Y. App. Div. 354. *Cf. Williams* v. *Hays*, 143 N. Y. 442.

INTERSTATE COMMERCE — CONTROL BY STATES — ATTACHMENT OF ROLLING STOCK OF NON-RESIDENT CARRIER AND GARNISHMENT OF CONNECTING CARRIERS FOR FREIGHT COLLECTIONS. — The plaintiff brought suit in Iowa for a tort committed in Illinois by an Ohio corporation having no agent in Iowa. He attached some of the defendant's freight cars that were in Iowa in the possession of other railways, which had received them at a point outside the state and which were, by agreement, either forwarding them to the consignees of the freight or returning them empty to the defendant. Also, these other railways, foreign corporations having agents in Iowa, were garnisheed for freight collections which they might owe the defendant. An Act of Congress authorized railways to arrange for continuous carriage. *Held*, that the attachment and garnishment are regulations of interstate commerce not within the power of a state. *Davis* v. *Cleveland, etc., Ry. Co.*, 146 Fed. Rep. 403 (Circ. Ct., N. D. Ia., W. D.). See NOTES, p. 319.

INTERSTATE COMMERCE — CONTROL BY STATES — RIGHT TO STOP THROUGH TRAINS. — The Mississippi legislature established a railroad commission with discretionary power to cause all trains to stop at county-seats and at other places where business or public convenience should require. The commission

required two through trains, carrying mails from Chicago to New Orleans under special contract with the United States government, to stop at a county-seat already adequately provided with train service. *Held*, that this is an improper interference with interstate commerce. *Miss. Ry. Commission* v. *Ill. Central Ry.*, U. S. Sup. Ct., Dec. 3, 1906.

For a discussion of the principles involved, see 10 HARV. L. REV. 378.

INTERSTATE COMMERCE — INTOXICATING LIQUORS — DEFINITION OF "ARRIVAL" IN WILSON ACT. — The Wilson Act of 1890 provided that liquors transported into a state should, upon arrival in the state, become subject to the police law thereof. Acting under such state law, officers seized liquor in a railway warehouse before notice had been sent to the consignee or before a reasonable time for removal had elapsed. *Held*, that the seizure is unlawful, since the liquors have not "arrived" within the meaning of the Wilson Act. *Heymann* v. *Southern Ry. Co.*, U. S. Sup. Ct., Dec. 3, 1906.

It has been held that liquors have not "arrived in the state" within the meaning of the Act, and therefore remain articles of interstate commerce, when they have just been unloaded on the station platform at their destination. *Rhodes* v. *Iowa*, 170 U. S. 412. The present case further decides that even after removal to the railway warehouse they have not "arrived." Both cases suggest that the goods would have "arrived" after delivery to the consignee or storage for him, though they were still in the original packages. This interpretation twists the literal meaning of the word in order to follow the general tenor of the Act and the intention of Congress presumed from the occasion of its enactment. See *Rhodes* v. *Iowa*, *supra*. There is further reason for this interpretation under the theory that the federal commerce power is exclusive of that of the states; for if the Act were construed to give control of interstate liquor shipments before delivery, with the consequent direct effect on the shipping contracts, it would not merely mark the time at which imported goods should come under state laws, but would more plainly allow states to regulate interstate commerce. See *American Express Co.* v. *Iowa*, 196 U. S. 133.

LEGACIES AND DEVISES — CONSTRUCTION — DIRECTION TO PURCHASE ANNUITY AS CREATING VESTED LEGACY. — A testator devised his residuary estate to trustees upon trust to purchase in the name of the testator's wife a government annuity of a certain value. The wife survived the testator, but died before the will had been proved without having made any election to take the value of the annuity in cash. The administrators of the widow's estate claimed the sum which, at the testator's death, would have purchased such an annuity. *Held*, that they are entitled to it. *In re Robbins*, [1906] 2 Ch. 648.

Since the beneficiary of such a provision could immediately resell the annuity, the English courts do not compel the trustee to purchase it if the beneficiary elects to take the value directly. *Ford* v. *Batley*, 17 Beav. 303. This procedure may sometimes avoid a useless diminution in the sum realized by the beneficiary, but the advisability of discharging a trust in a way so obviously adapted to defeat the object of the settlor is doubtful. It is but a short step to say that since the annuitant has this right of election, there is in effect a legacy the right in which vests at once on the testator's death. *Bayley* v. *Bishop*, 9 Ves. Jr. 6. Such is the construction in the present case. The English courts have refused, however, to apply this principle where the testator had provided for limitations over in case the beneficiary should assign. *Power* v. *Hayne*, L. R. 8 Eq. 262. Since the necessary consequence of the application of this doctrine is to transfer a fund to persons for whom the testator never intended to provide, it seems a proper place to hold rather that the trust has failed.

LIENS — PRIORITIES — CONFLICTING CLAIMS. — An agreement by the tenant to mortgage his crop was inserted in a contract to lease certain land, and A, the lessor, failed to record the instrument. B later obtained a mortgage on the same crop, by its terms subject to A's claim, and recorded it. Subsequently C, ignorant of A's rights, became the tenant's creditor and secured an attachment lien against his crop. A statute provided that instruments creating legal or

equitable interests must be recorded in order to give rights superior to those of creditors. Suit was brought in equity to determine the priority of the claims of the respective parties. *Held*, that C should be preferred first, and A second. *Bowles' Exec.* v. *Jones*, 96 S. W. Rep. 1121 (Ky.).

Since B's mortgage was by its terms subject to A's equitable claim, as between the two the fact that A failed to record the instrument under which he claimed could make no difference. *Howard* v. *Chase*, 104 Mass. 249. As between B and C, B's rights were superior because his mortgage was recorded before C became a creditor. See 7 HARV. L. REV. 241. If C had no notice actual or constructive of A's unrecorded lien, he should be preferred before A. *Wicks* v. *McConnell*, 102 Ky. 434. Even if this were the case it would be difficult to find a ground for preferring C's claim to B's, for it can hardly be maintained that B was guilty of misconduct. *Hoag* v. *Sayre*, 33 N. J. Eq. 552. It has been stated that subsequently acquired liens subject to a second mortgage which was by its terms subject to a first mortgage must necessarily be subject to the first. See *Bundy* v. *Iron Co.*, 38 Oh. St. 300, 312. This line of reasoning applies here. The filing of B's mortgage should be held to be constructive notice of A's claim, to which it specifically refers, and the order of preference should be, first A, then B, and last C.

LIMITATION OF ACTIONS — NEW PROMISE AND PART PAYMENT — EFFECT WHEN MADE BY ONE OF JOINT OBLIGORS. — A statute provided that the real estate of a deceased debtor should be assets for the payment of his debts. A testator devised to his son a part of his real estate which was encumbered with a mortgage debt. The devisee paid interest on the debt for thirty years. Then the mortgagee secured judgment against the testator's executor. The residue of the testator's land had been sold under the terms of a trust imposed by the will, and the judgment creditor claimed the fund in the hands of the trustee as assets of the estate. The beneficiaries of the trust were permitted to plead the Statute of Limitations. *Held*, that part payment by the devisee of the mortgaged property does not keep the debt alive as to property not in the first instance charged with it. *In re Lacey*, 41 L. Jour. 754 (Eng., Ch. D., Nov. 15, 1906).

For comment on an opposite decision by the same court, see 19 HARV. L. REV. 57.

MUNICIPAL CORPORATIONS — OFFICERS AND AGENTS — EFFECT OF RE-ELECTION AFTER OUSTER. — The defendant, the mayor of Kansas City, had been guilty of official misconduct. In *quo warranto* proceedings judgment of ouster was rendered against him, expressly excluding him from his office for the remainder of his term. During the forbidden period he was again elected mayor, and assumed to exercise the powers of the office. *Held*, that he may be punished for contempt. *State* v. *Rose*, 86 Pac. Rep. 296 (Kan.). See NOTES, p. 316.

NEGLIGENCE — DUTY OF CARE — TRESPASSING CHILDREN ON HIGHWAY. The defendant's employees were stringing cable on the highway by a rope passed through a pulley and attached to a team of horses. The employees several times chased children away from the machinery. While the rope was still, the plaintiff, a child of seven years, took hold of it near the pulley. The employees started the team, and the plaintiff's hands were crushed. *Held*, that the judgment for the plaintiff be affirmed. Two judges dissented. *O'Leary* v. *Michigan State Telephone Co.*, 109 N. W. Rep. 434 (Mich.).

The law in this sort of case is in a confused, unsatisfactory condition. There appears, however, in recent cases a wholesome tendency to decide these questions from the standpoint of public policy. See 11 HARV. L. REV. 349, 360; 12 *ibid.* 206. In the case at hand, both parties were where they had equal rights to be, as distinguished from the turntable cases. The defendant's knowledge of the proximity and the inclinations of the children warned it that danger to them was imminent rather than merely possible. Thirdly, not the plaintiff's trespass, but the defendant's act brought the force into play. This leaves us

to balance harm to trespassing children against a restraint on the beneficial uses of machinery in that the owner should exercise due care while operating it on highways when he can reasonably anticipate that children are in perilous situations. So from the standpoint of public policy the decision seems correct. Although a search of the authorities reveals only distinguishable states of fact, the reasoning in somewhat similar cases where the defendant was held liable supports the one at hand. *Powers* v. *Harlow*, 53 Mich. 507; *Lynch* v. *Nurdin*, 1 Q. B. 29. And in those *contra* the reasoning does not always oppose it. *Bishop* v. *Union Ry. Co.*, 14 R. I. 314; but see *Mangan* v. *Atterton*, L. R. 1 Exch. 239.

NUISANCE — RECOVERY OF DAMAGES — RECOVERY BY LESSEE OF PREMISES RENDERED UNINHABITABLE. — The defendant so negligently conducted building operations on a lot adjoining a dwelling-house occupied by the plaintiff under a lease, that the latter premises were rendered uninhabitable. *Held*, that as items of damage the plaintiff may recover, (1) the cost of storing his furniture until the expiration of his lease, (2) the difference in living expenses after removing from the house, (3) for the loss of comfort suffered by the plaintiff and his family in consequence of the defendant's negligent acts. One justice dissented. *McFadden* v. *Thompson-Starrett Co.*, 36 N. Y. L. J. 871 (N. Y., Sup. Ct., Dec., 1906).

It seems generally settled that upon a wrongful eviction by the landlord, a tenant's recovery is limited to the difference between the value of the lease and the rent reserved. *Trull* v. *Granger*, 8 N. Y. 115. So, though the eviction may result in loss of profits, the tenant is not allowed compensation therefor. *Dennison* v. *Ford*, 10 Daly (N. Y.) 412. One case finds justification for this doctrine in the analogy between a leasehold and a personal chattel, the theory being that since the owner of a chattel is not allowed compensation for possible profits from its use, the tenant whose lease is destroyed should be similarly limited in his recovery. See *Dennison* v. *Ford*, *supra*. But a leasehold, whether used as a dwelling-place or a place of business, is sufficiently differentiated from a personal chattel to justify a different rule. *Shaw* v. *Hoffman*, 25 Mich. 162. In considering the tenant's damage it seems immaterial, aside from his liability for rent, whether he be evicted by his landlord or by an independent wrongdoer. Thus there is force in the contention of the dissenting judge that the measure of damages should be the same in both cases. The present decision, however, seems right in result, and to indicate an error in the rule applied in the constructive eviction cases. See *Shaw* v. *Hoffman*, *supra*. *Cf.* 19 HARV. L. REV. 50.

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — SALE OF PATENT RIGHT. — A Kansas statute required the filing of copies of letters patent before a sale of the patent rights. It was contended that the statute violated the constitutional right of Congress to grant patents and the federal laws giving free rights to sell them. An Arkansas statute made a note given in payment for a patent right void if it did not show on its face for what it was given. *Held*, that both statutes are valid as reasonable exercises of the states' police power. *Allen and Allen, Adm.* v. *Riley; Woods and Sons* v. *Carl*, U. S. Sup. Ct., Dec. 3, 1906.

The use of articles made under letters patent is subject to the same control by the state as other articles of the same nature. *Patterson* v. *Kentucky*, 97 U. S. 501. But the intangible property arising from a patent right has been distinguished. See *Castle* v. *Hutchinson*, 25 Fed. Rep. 394. And the validity of statutes regulating the sale of such rights has been denied. *Hollida & Ball* v. *Hunt*, 70 Ill. 109; *Pegram* v. *American Alkali Co.*, 122 Fed. Rep. 1000. But the better view seems to be that such regulation is within the police power of the state. *Brechbill* v. *Randall*, 102 Ind. 528; *State* v. *Cook*, 107 Tenn. 499. The present decisions are the first on the subject by the Supreme Court. The reasoning of the court is that patent rights form a peculiar class, in the sale of which fraud is easily accomplished, and that regulation of such sales by the state to protect its citizens from frauds does not interfere with any federal

legislation. Neither the filing of papers nor the statement of the consideration on the face of notes given for the sale interferes with the exclusive right of the patentee or his assigns to sell. And it is only this right to exclude others which has been given by Congress. See *In re Brosnahan*, 18 Fed. Rep. 62.

PROHIBITION — NOT MAINTAINABLE WHERE ANOTHER REMEDY EXISTS. — The relator was served with a subpœna entirely insufficient in substance under circumstances such as to warrant the conclusion that the information was laid before the magistrate simply to serve private ends. To resist the subpœna, for disobedience of which both a fine and imprisonment were prescribed, the relator brought a writ of prohibition. *Held*, that although the subpœna is void, a writ of prohibition will not be granted, since the relator has an adequate remedy through a writ of *habeas corpus*. Two judges dissented. *People ex rel. Livingston* v. *Wyatt, Justice*, 36 N. Y. L. J. 829 (N. Y., Ct. App., Nov. 20, 1906).

Although an inferior court has acted in relation to a matter within its jurisdiction, a writ of prohibition may nevertheless issue in case of the use of an unauthorized power. *Appo* v. *The People*, 20 N. Y. 531; *In re Holmes*, [1895] 1 Q. B. 174. But it is a fundamental principle that where there is adequate relief in another form this extraordinary remedy cannot be invoked. *Ex parte Braudlacht*, 2 Hill (N. Y.) 367. It has been said that until the party aggrieved has applied in vain to the inferior tribunal for relief there can be no recourse to prohibition. See HIGH, EXTRAOR. REM., § 765. This seems to be true, however, only in case an appeal would lie from the lower court's decision, and there was no provision for such an appeal in the present case. The argument of the court that *habeas corpus* would afford adequate relief seems scarcely satisfactory. No escape is left the relator from being adjudged in contempt of court, subject to a fine and at least temporary arrest. Such a result conflicts, too, with the sounder, though somewhat extreme, view that other remedies which will preclude one from relief by prohibition must be equally effective and reasonably prompt and efficient. See *State* v. *Elkin*, 130 Mo. 90, 109.

RAILROADS — POWER TO LEASE — LIABILITY OF LESSOR FOR NEGLIGENCE OF LESSEE. — Under statutory authority the defendant company had leased its line to a company which thereafter exercised complete supervision and control. The plaintiff was injured by the negligence of the servants of the lessee company and attempted to recover against the lessor company. *Held*, that the defendant, having leased its property by authority of statute, is not responsible for the negligence of the lessee company. One justice dissented. *Moorshead* v. *United Rys. Co.*, 96 S. W. Rep. 261 (Mo., St. Louis Ct. App.).

There is a sharp conflict on the point here involved. Some courts maintain that even though a railroad lease have legislative sanction, the lessor company nevertheless remains liable for the lessee's negligence. This view is based upon the impolicy of permitting a corporation originally clothed with public franchises to cast the attendant liabilities upon other corporations of, perhaps, doubtful responsibility. *Chollette* v. *Omaha & R. V. Rd. Co.*, 26 Neb. 159. These courts have gone so far as to hold the lessor liable to employees of the lessee injured by the latter's negligence. *C. & G. T. Ry. Co.* v. *Hart*, 209 Ill. 414; *contra*, *Va. Midland Ry. Co.* v. *Washington*, 86 Va. 629. Other jurisdictions hold that statutory authorization of the lease carries with it, by necessary implication, exemption of the lessor from continuing liability, the contention being that liability for negligent operation is inseparable from the power of controlling operation. *Pinkerton* v. *Traction Co.*, 193 Pa. St. 229. The present well-considered decision seems to be in accord with the better reasoning, and with the slight weight of authority. Distinctions in these cases are properly drawn between liability for injuries due to negligent operation and those due to defective original construction. *St. L., W. & W. Ry. Co.* v. *Curl*, 28 Kan. 622. Distinctions are also drawn, though with less propriety, between duties imposed by charter or statute and duties imposed by common law. *Arrowsmith* v. *Nashville & D. R. Co.*, 57 Fed. Rep. 165.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — AGREEMENT AS TO SALE OF CHATTELS — EFFECT ON SUB-VENDEE. — The plaintiffs, publishers, printed in their books a notice that the books were to be sold only at a certain price, at retail, and by their authorized agents, and that purchasers should not re-sell within a certain time. On breach of any of these stipulations, the title was to revest in the publishers. The defendant, with knowledge of this notice, violated its conditions. *Held*, that there may be a preliminary injunction to restrain him. *Authors and Newspapers' Ass'n* v. *O'Gorman Co.*, 147 Fed. Rep. 616 (Circ. Ct., Dist. R. I.).

For a discussion of the principles involved, see 17 HARV. L. REV. 415. *Cf. Bobbs-Merrill Co.* v. *Straus*, 147 Fed. Rep. 15 (C. C. A., Second Circ.); *Scribner* v. *Straus*, 147 Fed. Rep. 28 (C. C. A., Second Circ.).

STATUTE OF FRAUDS — PART PERFORMANCE — REPUDIATION OF CONTRACT BEFORE ACTION UPON IT. — The defendant orally agreed to give the plaintiff a ten-year lease of certain premises. Later a disagreement arose, the defendant claiming it was to be for only five years. Though the plaintiff was informed that he could not have a lease for more than five years, he entered, made improvements, and demanded the execution of a ten-year lease. *Held*, that the contract cannot be enforced. *Czermak* v. *Wetzel*, 100 N. Y. Supp. 167 (App. Div.).

This New York decision illustrates the true principle on which specific performance of oral contracts within the Statute of Frauds is given when there is part performance by the plaintiff. The true basis of equity's interference is not that it is giving specific performance of the oral contracts, but the feeling that the promisee has an equity when, relying on the agreement, he has changed his position so that he cannot be adequately reimbursed nor put in as favorable a position as before. See 15 HARV. L. REV. 659. When the promisor repudiates the contract and the promisee, with notice, nevertheless sets out to act upon it, the theory on which equity proceeds in these cases does not apply. *Parke* v. *Leewright*, 20 Mo. 85; see *Wood* v. *Thornley*, 58 Ill. 464, 471. The promisor is innocent of any fraud; the promisee cannot say that he has acted on the faith of the promise. The promisor may lawfully stand on the statute, and refuse to perform the agreement. See *Dunphy* v. *Ryan*, 116 U. S. 491, 498. Having done so, he may allow the tenant to enter on other terms, without providing him with an equity.

TAXATION — PARTICULAR FORMS OF TAXATION — STATE INHERITANCE TAX ON STOCK OF SIMULTANEOUSLY INCORPORATED TWO-STATE CORPORATIONS. — A New York statute imposed an inheritance tax of 5 per cent upon all "property within the state" belonging to a non-resident decedent. A Connecticut decedent left in Connecticut shares in the Boston & Albany Railroad, a corporation simultaneously and in good faith incorporated both in New York and in Massachusetts. The main offices of the company and five-sixths of its trackage were in Massachusetts. New York officials assessed the shares at their full market value. *Held*, that they should be assessed at a value representing the proportion of the corporation's property within the state. *Matter of Cooley*, 186 N. Y. 220. See NOTES, p. 313.

TAXATION — PURPOSES FOR WHICH TAXES MAY BE LEVIED — RELIEF OF BLIND. — A statute provided that all blind adults who had been residents of the state for five years and had no means of support should be entitled to not more than twenty-five dollars per capita quarterly from the county treasury. *Held*, that the statute is unconstitutional, as it requires the expenditure for a private purpose of public funds raised by taxation. *Auditor of Lucas County* v. *State ex rel. Boyles*, 78 N. E. Rep. 955 (Oh.).

It is settled law that taxation can only be for public purposes. *Loan Ass'n* v. *Topeka*, 20 Wall. (U. S.) 655. But the line between what is a public and what is a private purpose has not been definitely determined. There are, though, some indicia of a public purpose that are established. Thus, if the general well-being of society and the present and prospective happiness and

prosperity of the people be subserved or advanced, the purpose is public. See *People* v. *Salem*, 20 Mich. 452. The benefit to the public, however, must be direct and not merely incidental or consequential. *Weismer* v. *Village of Douglas*, 64 N. Y. 91. The relief of the poor and the care of those who are unable to take care of themselves are among the unquestioned objects for which taxes may be laid. *State ex rel. Goodwin* v. *Nelson County*, 1 N. D. 88; see *Booth* v. *Town of Woodbury*, 32 Conn. 118, 128. Tested by these principles, it is hard to see why the general purposes in the present case were not of a public character. Under the operation of the statute, however, as it provided for no inquiry subsequent to the one awarding the aid, a beneficiary would still be entitled to receive his bounty after becoming self-supporting. Such a result would render the tax clearly unconstitutional.

TRUSTS — CREATION AND VALIDITY — PROVISION FOR INTEREST AND FINAL DISPOSITION. — The plaintiff's testator gave to the defendant a sum of money on the understanding that the latter should pay interest thereon to the testator during his life, and upon his death dispose of the sum according to instructions in a letter to be left by the testator. Upon the death of the testator, though the letter of instructions was duly found, his personal representatives claimed the fund. *Held*, that whether the agreement created a trust or not, the personal representatives cannot recover from the defendant. One justice dissented on the ground that the agreement resulted in a mere loan. *Morris* v. *Wucher*, 100 N. Y. Supp. 878 (App. Div.).

In spite of the court's hesitation as to the grounds for its decision, the result is undoubtedly correct. The fact that interest was to be paid on the amount is sufficient, according to the better view, to negative the existence of a trust. *Pittsburgh Nat'l Bk.* v. *McMurray*, 98 Pa. St. 538. The conclusion of the dissenting justice, however, that on that account the transaction can result in nothing but a debt recoverable by the testator or his representatives, does not follow. The defendant took title under a contract, first to pay interest, and second to make certain final disposition of the money received, and he cannot be compelled to do other than fulfil his contract. *Cf. Scrugg* v. *Alexander*, 72 Mo. 134. This conclusion is not open to the objection that it permits testamentary disposition of property without the formalities required by the Wills Act, for the testator parted with control at the time of the original transfer. A similar decision was reached in an English case on the erroneous ground that a valid trust was created. *Moore* v. *Darton*, 4 De G. & Sm. 517.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEE — EQUITABLE SET-OFF AGAINST INSOLVENT CESTUI QUE TRUST. — The estate of a *cestui que trust* brought suit for an account against the trustee's estate. The latter claimed the right to set off against the trust obligation certain claims held by the trustee personally against the *cestui*. The *cestui's* estate was insolvent. *Held*, that, owing to the insolvency, the set-off will be allowed in equity. *Smith* v. *Perry*, 95 S. W. Rep. 337 (Mo., Sup. Ct.).

At law only mutual debts may be set off against each other. *Tagg* v. *Bowman*, 99 Pa. St. 376; see MO. REV. STAT. 1899, §§ 4487–4499. It is also established that ordinarily a trustee when called on to account for trust property cannot set off personal claims against the *cestui*. *First Nat'l Bank* v. *Barnum Wire Works*, 58 Mich. 124, 315. But equity allowed set-off in general before statutes allowed it at law. *Ex parte Stephens*, 11 Ves. Jr. 26. And equity may, therefore, go further than the statutes and enforce by way of set-off cross-demands, whether arising out of the same or disconnected transactions, and whether liquidated or unliquidated. A ground of such equitable set-off is the insolvency of the party against whom it is claimed. *St. Paul Trust Co.* v. *Leck*, 57 Minn. 87. The extent to which the cases have gone has been to stay the collection of a liquidated claim until an unliquidated cross-claim should be determined and set off. *North Chicago Rolling Mill Co.* v. *St. Louis Steel Co.*, 152 U. S. 596. The present case goes further in allowing the set-off of a legal against an equitable claim. On its facts this case does not seem open to the objection of working an injustice to other creditors of the

cestui. It may therefore be supported as an extension of the general doctrine of equitable set-off.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — PROFITS ARISING FROM COMBINATION OF TRUST AND PERSONAL INTERESTS OF TRUSTEE. — The defendant was trustee of the plaintiff group of gas companies with entire control. He also owned a controlling interest in the competing group of companies. A coke manufacturing company needed a market for its by-product gas. By contemporaneous transactions the defendant entered into long-term contracts with it on behalf of the plaintiff companies and sold out his personal holdings in the other companies at an abnormal profit. *Held*, that the plaintiff companies are entitled to an equitable share of the personal profits. *Bay State Gas Co.* v. *Rogers*, 147 Fed. Rep. 557 (Circ. Ct., Dist. Mass.).

That a trustee cannot make use of trust-funds for private profit is fundamental. If he trade or speculate with them, he must account to the *cestui* for gains. *Norris's Appeal*, 71 Pa. St. 106. Only by removal of all temptation of self-interest can trustees' loyalty and prudence to defenseless *cestuis* be assured. 1 PERRY, TRUSTS, 5 ed., §§ 427 *et seq.* Nor can the trustee reap incidental benefit from his office, though the *cestui* himself could never have obtained it. *White* v. *Sherman*, 168 Ill. 589. If he himself act as solicitor or broker for his *cestui*, he gets nothing for his services, though he might have paid others for them. *Broughton* v. *Broughton*, 5 De G. M. & G. 160. He cannot buy up at a discount claims against the estate or incumbrances upon it and pocket the difference. *Rankin* v. *Barcroft & Co.*, 114 Ill. 441. Only Kentucky seems favorably disposed toward any kind of incidental profit. *Bush* v. *Webster*, 72 S. W. Rep. 364. The fiduciary capacity does not, however, disqualify a trustee from making profit in a common or joint enterprise with his *cestui*. *Levi* v. *Evans*, 57 Fed. Rep. 677. But equal zeal must be used in furthering each interest. *Scott* v. *Ray*, 18 Pick. (Mass.) 360. In the principal case single ownership of the combined interests involved a strategic position, intrinsically valuable, which could be realized on by sale of either holding. The profit should therefore be apportioned.

WILLS — JOINT WILLS — REVOCATION. — A and B made a joint will whereby each left his property to the other for life, and at the death of the survivor all the property of both was to go to C. A died. B accepted the decedent's estate, and then made another will revoking the first. *Held*, that C may recover such property from the defendants, to whom B voluntarily transferred it during his life, as he would have been entitled to under B's first will. *Bower* v. *Daniel*, 95 S. W. Rep. 347 (Mo., Sup. Ct.). See NOTES, p. 315.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

RIGHTS OF THE JAPANESE IN CALIFORNIA SCHOOLS. — Much popular discussion has been evoked by a rule adopted on October 11, 1906, by the board of school trustees of San Francisco, which provides that Japanese children shall attend schools set apart for Chinese, Japanese, and Koreans, and excludes them from other schools. In considering whether or not such action violates any rights of the Japanese, it may be well first to look at the question apart from the treaty between the United States and Japan.

It is generally held that local school officials have no power thus to provide for separate schools in the absence of express legislative authority.[1] But in the

[1] Ottawa Board of Education *v.* Tinnon, 26 Kan. 1; Wysinger *v.* Crookshank, 82 Cal. 588.